NO. 88-1993

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

ROBERT A. BUTTERWORTH, JR., Attorney General of the State of Florida, and T. EDWARD AUSTIN, JR., as State Attorney to the Charlotte County, Florida, Special Grand Jury,

Petitioners,

-vs-

MICHAEL SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATE OF ARIZONA IN SUPPORT OF PETITIONERS, AMICUS CURIAE

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QUESTION PRESENTED

Does the First Amendment require that the courts abandon their traditional role of overseeing the grand jury process by permitting a witness to unilaterally decide to publish his observations about a particular grand jury proceeding?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

INTEREST OF AMICUS CURIAE

Arizona has a statute that is somewhat more general than the Florida statute under review in this case. It reads:

> A person commits unlawful grand jury disclosure if such person knowingly discloses to another the nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding which is required by law to be kept secret, except in the proper discharge of his official duties or <u>when permitted by the court in furtherance of justice</u>.

(Emphasis added.) Ariz. Rev. Stat. Ann. § 13-2812(A). Like Florida's statute, this statute gives to the courts the ultimate decision whether grand jury information is to be made public. The opinion by the Eleventh Circuit in this case removes this discretion and opens grand jury proceedings to a far greater degree than that required by the First Amendment.

ARGUMENT

The grand jury system is an investigative body acting independently of either prosecutor or judge whose mission is to bring to trial those who may be guilty and clear the innocent. United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973). It is the clearing of the innocent that could suffer the most if the decision of the Court of Appeals, Eleventh Circuit stands. That opinion relies heavily on the fact that the proceeding at which respondent testified is now a closed investigation. Yet a person's reputation could be irreparably damaged by revelation that they were once under grand jury investigation even if the grand jury ultimately found allegations against them to be untrue. Furthermore, there are such things as overlapping investigations that may not be known to a witness when he decides to go public.

The opinion gives no thought to such an eventuality.

A second reason why the public interest is not served by allowing a grand jury witness to decide when and what to publish about his or her grand jury experience is the chilling effect this could have on subsequent investigations by the grand jury. The grand jury's operation is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. This Court discussed the wide-ranging nature of a grand jury investigation in United States v. Calandra, 414 U.S. 338, 94 S. Ct 613, 38 L. Ed. 2d 561 (1974). The grand jury may even probe tips and rumors in serving society's interest in a thorough and extensive investigation. Id. In publicizing the answers given, the grand jury witness will also be publicizing the questions asked. It would be impossible

to frame questions to witnesses without revealing investigative leads and other confidential matters. If a witness may reveal his grand jury testimony then his or her observations of the reaction of that testimony on the prosecutor and the grand jurors may become public as well. In short, the witness may tell more than just his or her own story. This eroding of the traditional grand jury confidentiality may mean that future information may be lost as well. That may be an unprovable fact in this case. But it stands to reason that it certainly cannot encourage people to come forward with information of possible wrongdoing.

Arizona's answer to the competing interests involved in this question does not mean that abuses of the grand jury will go undetected or that public corruption will remain hidden. There is a complete record made of everything that takes place before the grand jury with

the exception of their deliberations. Rule 12.8, Ariz. R. Crim. P. That record is available for review by the courts and under the statute quoted above the courts may decide to release those transcripts to the public in the furtherance of justice.

Respondent may argue that this system does not ameliorate a potential chilling effect on the media. However, no reporter is prohibited from disseminating any information that he or she obtains from sources other than the grand jury proceeding. And all potential grand jury witnesses can move to quash a grand jury subpoena if he or she believes such action is in violation of constitutional rights, oppressive, abusive, or otherwise unlawful. Marston's Inc. v. Strand, 114 Ariz. 260, 560 P.2d 778 (1977).

CONCLUSION

The competing interests in this case are not unlike the interests this Court

and others have balanced in a variety of contexts. See, e.g., United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). What respondent seeks is to have the proponent of part of those interests, interests that include commercial gain, be given free reign to usurp the privacy of others and the effective functioning of the grand jury. It is submitted that the First Amendment does not require that result. The courts are in a better position to balance those interests on a case-by-case basis.

Respectfully submitted,
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CERTIFICATE OF SERVICE

THREE COPIES of this brief were mailed November 16, 1989, to:

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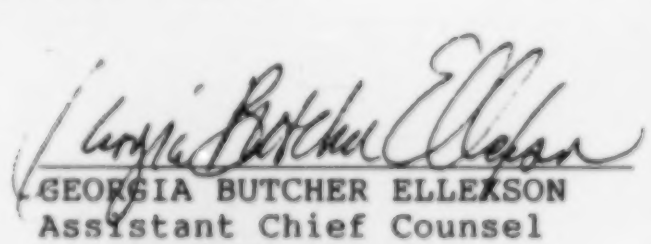

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